

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1119

Criminal Justice

SPONSOR(S): Gibson

TIED BILLS:

IDEN./SIM. BILLS: SB 910

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Public Safety & Domestic Security Policy Committee		Krol	Kramer
2) Governmental Affairs Policy Committee			
3) Criminal & Civil Justice Policy Council			
4) Full Appropriations Council on General Government & Health Care			
5)			

SUMMARY ANALYSIS

**Restrictions on the Employment of Ex-Offenders**

The bill requires state agencies and regulatory boards to submit to legislative officers and committees a report that outlines current restrictions on the employment of ex-offenders and possible alternatives that are compatible with protecting public safety.

**Restoration of Civil Rights**

The bill provides that restoration of civil rights cannot be required as a condition of eligibility for public employment or to obtain a license, permit, or certificate. Conviction of a felony or first degree misdemeanor may still be disqualifying if the offense is relevant to the standards associated with or necessary for the protection of the public for the job for which the license, permit, or certificate that is sought.

**Sealing and Expunction of Criminal History Records**

The bill specifies in both the sealing and expunging statutes that no person can be liable for perjury when denying or failing to acknowledge the arrests and subsequent dispositions from a sealed or expunged record, including when asked on an employment application.

The bill requires the Clerk of Court to place on his or her website information on the availability of criminal history record sealing and expunction, including a link to the Florida Department of Law Enforcement's (FDLE) website for sealing and expunction applications and information.

The bill permits the contents of an expunged record to be disclosed to the subject of the record without requiring him or her to obtain a court order.

The bill also allows for a second sealing of a criminal record if the subject of the record has been crime-free for five years (meaning no subsequent arrests have occurred since the date of the court order for the initial criminal history record expunction or sealing).

**OPPAGA Study**

The bill directs the Office of Program Policy Analysis and Government Accountability (OPPAGA), in consultation with the FDLE, to study the accuracy of criminal history records and report its findings to the Legislature by February 1, 2010.

This bill will have a fiscal impact on FDLE and may have a fiscal impact on other state agencies.

## HOUSE PRINCIPLES

Members are encouraged to evaluate proposed legislation in light of the following guiding principles of the House of Representatives

- Balance the state budget.
- Create a legal and regulatory environment that fosters economic growth and job creation.
- Lower the tax burden on families and businesses.
- Reverse or restrain the growth of government.
- Promote public safety.
- Promote educational accountability, excellence, and choice.
- Foster respect for the family and for innocent human life.
- Protect Florida's natural beauty.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### ***Civil Rights Restoration and Restrictions on the Employment of Ex-Offenders***

Upon felony conviction, a person's civil rights are suspended until restored by pardon or through the restoration of civil rights process. The Florida Constitution specifies only the loss of the right to vote and the right to hold public office as consequences of a felony conviction.<sup>1</sup> Other civil rights lost in accordance with statutes include the right to serve on a jury, to possess a firearm, and to engage in certain regulated occupations or businesses.

While a criminal conviction does not automatically disqualify a person<sup>2</sup> from gaining employment with the state, a person may be denied employment by the state if the person committed a crime that was a felony or first degree misdemeanor and directly related to the position of employment.<sup>3</sup>

A person<sup>4</sup> whose civil rights have been restored will not be disqualified from obtaining a license, permit, or certificate from a public agency to engage in an occupation, trade, vocation, profession, or business unless the crime for which their rights have been suspended was a felony or first degree misdemeanor and directly related to the position for which the license, permit, or certificate is required or if the statute or rule governing the profession specifies a disqualifying offense.<sup>56</sup> Some licensing boards have interpreted this statute to imply a requirement for restoration of civil rights and have denied licenses based upon this interpretation.<sup>7</sup>

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<sup>1</sup> Article VI, Section 4(a).

<sup>2</sup> Except as provided in s. 775.16, F.S., entitled, "Drug offenses; additional penalties."

<sup>3</sup> Section 112.011(1)(a), F.S.

<sup>4</sup> Except as provided in s. 775.16, F.S.

<sup>5</sup> Section 112.011(1)(b), F.S.

<sup>6</sup> Section 112.011(2), F.S., exempts counties and municipalities that are hiring for positions deemed to be critical to security or public safety, law enforcement agencies, and correctional agencies from the provisions of subsection (1).

<sup>7</sup> Three District Courts of Appeal overturned licensing board decisions to deny licenses based upon interpreting s. 112.011(1)(b), F.S., to require restoration of civil rights. See *Yeoman v. Construction Industry Licensing Board*, 919 So.2d 542 (Fla. 1st Dist. 2005); *Scherer v. Department of Business and Professional Regulation*, 919 So.2d 662 (Fla. 5th Dist.

State agencies restrict occupational licenses and employment to ex-offenders based upon statute, administrative rule, or agency policy. The nature and variety of occupational licenses and employment with state agencies dictate that different standards will apply to different types of employees and licensees.

Restrictions based on agency policy that are not adopted as rules could be problematic. A rule is defined as each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of an agency and includes any form which imposes any requirement or solicits any information not specifically required by statute or by an existing rule.<sup>8</sup> Rulemaking is not a matter of agency discretion. Each agency statement defined as a rule must be adopted by the rulemaking procedure provided in ch. 120, F.S., as soon as feasible and practicable.<sup>9</sup> Thus agencies may impose employment or licensing restrictions on applicants that are based on agency policy rather than based on statute or rules adopted pursuant to statutory authority.

In 2005, Governor Bush established the Ex-Offender Task Force (Task Force) to “help improve the effectiveness of the State of Florida in facilitating the re-entry of ex-offenders into their communities so as to reduce the incidence of recidivism.”<sup>10</sup> The Task Force estimated that almost forty percent of the 7.6 million public and private jobs in Florida are subject to criminal background checks or restrictions based on criminal history. The restrictions include requiring restoration of civil rights, disqualification based on commission of specific crimes, or requiring the passing of a background check under Chapter 435, F.S. Less defined restrictions require assessment of whether the applicant has good moral character or has committed an act or crime of moral turpitude.

The Task Force found that convicted felons face significant barriers to employment because of these restrictions. Executive agencies were instructed to produce for the Task Force a report detailing all employment restrictions and disqualifications based on criminal records.<sup>11</sup>

In 2007, the Governor’s Office surveyed non-Cabinet agencies regarding licensing and employment restrictions.<sup>12</sup> Nine agencies reported licensing restrictions, citing criminal history or restoration of civil rights as the legal basis for the restrictions. The presentation noted that pursuant to s. 112.011, F.S., an agency may deny employment by reason of the prior conviction for a crime if the crime was a felony or first degree misdemeanor and directly related to the position of employment sought. Specific civil rights restrictions for licenses and employment are found throughout the Florida Statutes.<sup>13</sup>

The presentation noted that the overwhelming majority of licenses that were denied in the prior two years were due to statutory restrictions relating to criminal convictions and not for a requirement for civil rights restoration. During the prior year, over 4,000 licenses were denied, but only 14 were denied due to a lack of restoration of civil rights. These denials were by the Department of Health’s (DOH) Board of

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2006); *Vetter v. Department of Business and Professional Regulation, Electrical Contractors’ Licensing Board*, 920 So.2d 44 (Fla. 2nd Dist. 2005).

<sup>8</sup> Section 120.52(16), F.S.

<sup>9</sup> Section 120.54(1)(a), F.S.

<sup>10</sup> Executive Order No. 05-28.

<sup>11</sup> Executive Order No. 06-89.

<sup>12</sup> “Report on the Survey of License and Employment Restrictions in State Agencies,” prepared by the Public Safety Unit of the Office of Policy and Budget within the Executive Office of the Governor in October 2007.

<sup>13</sup> Statutorily-mandated requirements for civil rights restoration related to the Department of Revenue (s. 206.026, F.S. - terminal supplier, importer, exporter, blender, carrier, terminal operator, or wholesaler fueler license); and DBPR (s. 447.03, F.S. – labor union business agent license; s. 550.1815, F.S. – horseracing, dog racing, or jai alai front on permit).

Nursing (12 denials)<sup>14</sup> and the Department of Business and Professional Regulation's (DBPR) Construction Industry Licensing Board (2 denials).<sup>15</sup> The presentation reported that DOH and the Department of Highway Safety and Motor Vehicles (DHSMV) restrict some licenses based upon a requirement for restoration of civil rights. Outside of the Governor's agencies, the Department of Agriculture and Consumer Services and the Department of Financial Services have both statutorily-mandated and non-mandated requirements for restoration of civil rights. It was noted that there was no way to estimate how many persons were deterred from applying for licensing because of an actual or perceived requirement for civil rights restoration.

### ***Sealing and Expunction of Criminal History Records***

When a record is sealed it is not destroyed, but access is limited to the subject of the record, his or her attorney, law enforcement agencies for their respective criminal justice purposes, and certain other specified agencies for their respective licensing and employment purposes.<sup>16</sup>

When a record is expunged, it is physically destroyed and no longer exists if it is in the custody of a criminal justice agency other than the Florida Department of Law Enforcement (FDLE). Criminal justice agencies are allowed to make a notation indicating compliance with an expunction order.<sup>17</sup> FDLE, on the other hand, is required to retain expunged records. FDLE can administratively expunge non-judicial records of arrest that are made contrary to law or by mistake.<sup>18</sup>

Records that have been sealed or expunged are confidential and exempt from the public records law. It is a first degree misdemeanor to divulge their existence, except to specific entities for licensing or employment purposes.<sup>19</sup>

A record is ineligible for sealing or expunction if that record pertains to any of the following offenses:

- sexual misconduct with developmentally disabled clients, mental health patients, or forensic clients;
- luring or enticing a child;
- sexual battery;
- procuring a person under 18 years for prostitution;
- lewd, lascivious, or indecent assault upon a child;
- lewd or lascivious offenses committed on an elderly or disabled person;
- communications fraud; sexual performance by a child;
- unlawful distribution of obscene materials to a minor;
- unlawful activities involving computer pornography;
- selling or buying minors for the purpose of engaging in sexually explicit conduct;
- offenses by public officers and employees;
- drug trafficking; and
- other dangerous crimes such as arson, aggravated assault or battery, kidnapping, murder, robbery, home invasion robbery, carjacking, stalking, domestic violence, and burglary.<sup>20</sup>

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<sup>14</sup> The Board of Nursing removed its discretionary requirement of civil rights restoration in November 2007.

<sup>15</sup> Section 489.115, F.S., was amended by Senate Bill 404 in 2007 to provide that the Construction Industry Licensing Board cannot deny a contractor's license based solely upon a felony conviction or the applicant's failure to provide proof of restoration of civil rights. If the applicant was convicted of a felony, licensure denial may be based upon the severity of the crime, the relationship of the crime to contracting, or the potential for public harm. The Board is also required to consider the length of time since the commission of the crime and the rehabilitation of the applicant.

<sup>16</sup> Section 943.059(4), F.S.

<sup>17</sup> Section 943.0585(4), F.S.

<sup>18</sup> Section 943.0581, F.S.

<sup>19</sup> Section 943.0585(4)(c) and 943.059(4)(c), F.S.

A record may be sealed or expunged if the petitioner for the sealing or expunction:

- Has never, prior to the date of filing, been adjudicated guilty of a criminal offense or adjudicated delinquent for committing any felony or misdemeanor of the specified statutes,
- Has not been adjudicated guilty or delinquent for committing any of the acts stemming from the arrest or alleged activity to which the sealing,
- Has never had a prior sealing or expunction, and
- Is eligible for a sealing to the best of their knowledge and does not have any other petition to seal or expunge pending before the court.<sup>21</sup>

All records must be sealed for 10 years before expunction unless a plea was not entered or all charges related to the arrest or alleged criminal activity related to the record was dismissed prior to trial.<sup>22</sup>

Persons who have had their criminal history records sealed or expunged may lawfully deny or fail to acknowledge the arrests covered by their record, except when they are a defendant in a criminal prosecution, petition the court for a record sealing or expunction, apply for certain types of employment,<sup>23</sup> or seek authorization from a Florida seaport.<sup>24</sup> A person whose criminal history record is sealed must acknowledge the arrests covered by their record when attempting to purchase a firearm and is subject to a criminal history background check under state or federal law.<sup>25</sup>

In 1992, the Legislature amended the sealing and expunction statute to require a person seeking a sealing or expunction to first obtain a certificate of eligibility from FDLE and then, if the person meets the statutory criteria based on the department's criminal history check and receives a certificate, he or she can petition the court for a record sealing or expunction. It is then up to the court to decide whether the sealing or expunction is appropriate.

### **OPPAGA Study**

In February 2009, the Office of Program Policy Analysis and Government Accountability (OPPAGA) published a report regarding the criminal record process.<sup>26</sup> They reviewed three questions:

- What safeguards exist to ensure that criminal history data maintained by the criminal justice agencies is accurate, current, and complete?
- What safeguards exist to ensure that employers receive accurate criminal history information?
- What safeguards protect applicants from the unauthorized release of sealed or expunged records?

OPPAGA found that there are accurate safeguards in place to ensure that criminal history data maintained by criminal justice entities is accurate, current, and complete. However, private background check companies who sell criminal history data to employers may be less reliable. OPPAGA found that some companies sell and maintain records that are not current; use name-based checks, which are less reliable than fingerprint-based checks; and provide information that may not cover all law enforcement jurisdictions or time periods.

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<sup>20</sup> Sections 943.0585 and 943.059, F.S.

<sup>21</sup> Sections 943.0585(1)(b) and 943.059(1)(b), F.S.

<sup>22</sup> Section 943.0585(2)(h), F.S.

<sup>23</sup> Employment with law enforcement; The Florida Bar; or working with children, the developmentally disabled, or the elderly through the Department of Children and Family Services, the Department of Juvenile Justice, the Department of Education, any district school board, or local governmental entity licensing child care facilities; or a Florida seaport

<sup>24</sup> Section 943.0585(4)(b) and 943.059(4)(b), F.S.

<sup>25</sup> Section 943.059(4)(a)7., F.S.

<sup>26</sup> Report No. 09-10

OPPAGA also found that criminal justice agencies use several processes to ensure that sealed or expunged records are purged accordance with state statutes. Private companies currently have no requirement to purge records that have been sealed or expunged.

To address this issue, OPPAGA recommended that the Legislature could take two actions:

- Require private companies to disclose which Florida jurisdictions are included in their databases and the date the data was last updated. This would ensure that employers that intend to buy statewide criminal histories are aware if any jurisdictions or time periods are not included in the report.
- Require private companies to purge a record from their database upon receiving a copy of a court order to seal or expunge from the individual or his or her designee. This would help ensure that the privacy provided in the law extends beyond records maintained by criminal justice agencies to those maintained by private companies and reduce the unauthorized release of these records.

### **Effect of the Proposed Changes**

#### ***Restrictions on the Employment of Ex-Offenders***

HB 1119 requires each state agency, including, but not limited to, professional and occupational regulatory boards will submit a report to the President of the Senate, and the Speaker of the House of Representatives by December 31, 2010 and every 8 years after. This report will include:

- A list of all agency or board policies that disqualify a person who has been convicted of a crime and has completed any incarceration and restitution from employment or licensure,
- A review of these restrictions and their availability to prospective employees,
- The identification and evaluation of alternatives to the disqualifying policies that will promote ex-offender employment and protection of the public, and
- An evaluation of whether the disqualifying policies are broad and whether crimes or acts of “moral turpitude” should be more specifically or narrowly defined.

#### ***Restoration of Civil Rights***

HB 1119 specifically prohibits the disqualification of a person from receiving a license, permit, or certificate or from obtaining public employment on the grounds that his or her civil rights have not been restored. This applies notwithstanding any provision in another section of the Florida Statutes.

The bill retains the original language that permits a government entity to deny an application for a license, permit, or certificate to engage in an occupation, trade, vocation, profession, or business if the applicant was convicted of a felony or first degree misdemeanor that is directly related to the position for which the license, permit, or certificate is required. The exemptions within the section for county and municipal positions deemed to be critical to security or public safety, law enforcement agencies, correctional agencies, and fire departments are retained.

In effect, the bill provides that the restoration of civil rights will no longer be associated with public employment and licensure.

Changes to s. 112.011(1)(b), F.S., provide that regulatory boards may decide what criminal offenses would mark a person ineligible for license, permit, or certificate based on the protection of the public or other parties. Licenses, permits, or certificates may also still be denied if the criminal offense is relevant to the standards normally associated with the job.<sup>27</sup>

#### ***Sealing and Expunction of Criminal History Records***

The bill specifies in both the sealing and expunging statutes that no person can be liable for perjury when denying or failing to acknowledge the arrests and subsequent dispositions from a sealed or expunged record, including when asked on an employment application.

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<sup>27</sup> Section 112.011(1)(a), F.S.

The bill requires the Clerk of Court to place on his or her website information on the availability of criminal history record sealing and expunction, including a link to the Florida Department of Law Enforcement's (FDLE) website for sealing and expunction applications and information.

The bill permits the subject of an expunged record to request the record's contents through a notarized letter to FDLE. The subject of the record would no longer need to obtain a court order to receive the contents of an expunged record.

The bill allows for a second sealing of a criminal record if the subject of the record has been crime-free for five years (meaning no subsequent arrests have occurred since the date of the court order for the initial criminal history record expunction or sealing). The current requirements and other provisions in the sealing and expunction statutes would continue to apply when seeking a second sealing under the bill.

### ***OPPAGA Study***

The bill directs the Office of Program Policy Analysis and Government Accountability, in consultation with the FDLE, to study the accuracy of criminal history records and report its findings to the Legislature by February 1, 2010.

B. SECTION DIRECTORY: Section 1. Requires state agencies and regulatory boards to prepare reports that identify and evaluate restrictions on licensing and employment;

Section 2. Amends s. 112.011, F.S., an act relating to felons; removal of disqualifications for employment, exceptions.

Section 3. Amends s. 943.0585, F.S., an act relating to court-ordered expunction of criminal history records.

Section 4. Amends s. 943.059, F.S., an act relating to court-ordered sealing of criminal history records.

Section 5. Requires the Office of Program Policy Analysis and Government Accountability to prepare a report of its findings relating to the use of criminal history records in licensing and employment decisions.

Section 6. Provides an effective date of July 1, 2009.

## **II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

### **A. FISCAL IMPACT ON STATE GOVERNMENT:**

#### **1. Revenues:**

See "Fiscal Comments."

#### **2. Expenditures:**

See "Fiscal Comments."

### **B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

#### **1. Revenues:**

See "Fiscal Comments."

#### **2. Expenditures:**

See "Fiscal Comments."

### **C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

See "Fiscal Comments."

**D. FISCAL COMMENTS:**

The Department of Law Enforcement reports this bill will create a group of individuals who will become eligible for a second criminal history record sealing. They estimate an increase of 7,649 additional applications and 5099 court orders if only 25% of the bill's potential is realized within one year. With a cost of \$75.00 per application, the Department of Law Enforcement estimates annual recurring revenue of \$573,675. The increase in workload would reportedly require 3 additional Criminal Justice Customer Service Specialist positions for a total cost of \$453,660.

The Department of Management Services reports this bill will have a negligible fiscal impact, however they state larger agencies with more restrictive employment policies and a more diverse workforce may face a different fiscal impact.

**III. COMMENTS**

**A. CONSTITUTIONAL ISSUES:**

**1. Applicability of Municipality/County Mandates Provision:**

Not applicable because this bill does not appear to: require the counties or cities to spend funds or take an action requiring the expenditure of funds; reduce the authority that cities or counties have to raise revenues in the aggregate; or reduce the percentage of a state tax shared with cities or counties.

**2. Other:**

None.

**B. RULE-MAKING AUTHORITY:**

None.

**C. DRAFTING ISSUES OR OTHER COMMENTS:**

OPPAGA's 2009 study may provide answers to some of the provisions it is directed to study in the bill.

Numerous sections of statute currently authorize an agency or regulatory board to consider when an applicant's civil rights have been restored in determining whether to employ a person or issue a license. Although the bill provides that agencies and boards cannot consider whether a person's civil rights have been restored, the bill does not amend these sections to remove the conflicting language. It is recommended that these sections be amended to avoid confusion.

The bill allows for a regulatory board to deny an applicant if they have committed a first degree misdemeanor or felony crime that relates to "standards normally associated" with the specific occupation, trade, vocation, profession, or business for which the license, permit or certification is sought. It is unclear how regulatory boards will decide what the "standards normally associated" will be.

**IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES**